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Conscience and Civil Disobedience in Jewish, Christian, and Greek and Roman Thought

By MILTON R. KONVITZ*

THE FIRST CHAPTER OF *EXODUS* relates that the ruler of Egypt, alarmed by the increase in the number of Israelites, spoke to the Hebrew midwives and directed them to kill all male infants born to Hebrew women. "But the midwives feared God and did not as the king of Egypt commanded them, but saved the menchildren alive."¹ Thereupon the king issued a new decree, directed not to the midwives but to the people generally, ordering them to kill all newborn Hebrew males by throwing them into the River Nile.²

These events, which happened some 3,400 years ago, may well have been the first recorded instance of what is today called nonviolent civil disobedience. From the biblical text it is not clear that the midwives were themselves Hebrews. They acted as they did, not because they were Hebrews but because they "feared God." The text twice mentions the fact that they "feared God" or, as we would say today, that they listened to the voice of conscience rather than to the law of the state or the voice of the king.

In the first book of *Samuel* there is another clear and dramatic example of nonviolent civil disobedience. There it is related that

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1. *Exodus* 1:15-17 (all Biblical references are to the King James version unless otherwise noted).

2. *Exodus* 1:22.

when King Saul learned that a certain priest had given David food and other assistance, he ordered the priest to appear before him.

And the king said to the guards who stood about him, "Turn and kill the priests of the Lord; because their hand also is with David, and they knew that he fled, and did not disclose it to me." But the servants of the king would not put forth their hand to fall upon the priests of the Lord.³

This refusal to follow the king's orders may have been the first recorded instance of nonviolent civil disobedience by military men. It is not clear why the men of the guard refused to kill the priests and their families. It may have been because the victims belonged to the priestly class or because they were civilians. Whatever the reason, their action was a clear case of civil disobedience.

In the book of *Daniel* we find what may be the first recorded instances of what became a pattern of Jewish life and history, willing submission to martyrdom for the sake of one's religion. Chapter 3 records that King Nebuchadnezzar erected a huge image of gold and summoned all the high officials of the realm to attend the dedication. He ordered that they prostrate themselves and worship the image when they heard the sound of music, and that whoever disobeyed this command be thrown into a blazing furnace. It was later reported to the king that Shadrach, Meshach, and Abed-nego, three Jews who were high provincial administrators, had failed to worship the golden image. When charged by the King with this offense, they said to him:

We have no need to answer you on this matter. If there is a god who is able to save us from the blazing furnace, it is our God whom we serve, and He will save us from your power, O king; but if not, be it known to your majesty that we will neither serve your god nor worship the golden image that you have set up.⁴

Chapter 6 relates that Darius, the king, had appointed Daniel chief of his officers. The officers conspired to bring about the fall of Daniel and to this end contrived an ingenious trap. They induced Darius to issue a decree stating that for thirty days no man was to pray to any man or god except the king, on pain of death in the lion's den. Daniel,

3. 1 *Samuel* 22:17.

4. *Daniel* 3:16-18. The book was probably written in the second century B.C., though it purports to record events that were supposed to have happened in the sixth century B.C. The history that is contained in the visions recorded in *Daniel* goes from the Babylonian period (sixth century) to the second century B.C. *The Book of Daniel*, commentary by Raymond Hammer, CAMBRIDGE BIBLE COMMENTARY 3-6 (1976).

however, continued praying to God three times daily with the window of his chambers open toward Jerusalem. His enemies came upon him while he was praying and reported his disobedience to the King. After trying to find a way out, the King felt compelled to order Daniel put into the lion's den.

The stories in the book of *Daniel*, it should be noted, differ from the previously described incidents of civil disobedience. The first two cases involved moral conscience in the face of orders to commit murder. In the cases reported in the book of *Daniel*, however, the acts were not in the realm of moral conscience but in the realm of religious worship. Although these differences are significant, the concept of nonviolent civil disobedience is broad enough to accommodate these as well as additional types of conduct.⁵

The four books of *Maccabees* in the Apocrypha offer numerous instances of civil disobedience during the period of the Hellenization of Judea, when the second Temple was defiled and dedicated to Zeus Olympius.⁶ The Syrian overlords forbade the Jews to offer sacrifices and to observe the Sabbath and festivals. The Jews were compelled to make and worship idols, sacrifice swine, and leave their sons uncircumcised. Disobedience meant death. Among other stories, the second and fourth books of *Maccabees* relate the martyrdom of a mother and her seven sons who refused to eat forbidden food which was associated with idolatrous sacrifices. They stated unambiguously their view of non-violent civil obedience as they cried out to the king's officers, "[W]e are ready to die rather than transgress the laws of our fathers."⁷ The seven brothers, who were called Maccabees by the Church, became models for Christian martyrs, and although the rabbis rejected the books of the Apocrypha from the canon of Sacred Scripture, they nevertheless regarded as important the story of the seven brothers.⁸

Finally, what may be the first recorded instance of mass non-violent civil disobedience is found in Josephus' *Antiquities of the*

5. A further difference in these stories should also be noted. The Egyptian midwives, Saul's guards, and the three Jewish officials refused to commit an act which they felt was inconceivable. Daniel, however, committed a positive act; he did not merely refuse to perform an act, he performed an act in violation of a law.

6. See, e.g., 1 *Maccabees* 1:62-63, 2:20-22; THE NEW OXFORD ANNOTATED BIBLE WITH THE APOCRYPHA (rev. std. ed. 1973).

7. 2 *Maccabees* 7:2.

8. THE THIRD AND FOURTH BOOKS OF MACCABEES 129 (Hadas ed. & trans. 1953).

Jews.⁹ The event concerned the decision of Caligula to place his statue in the Temple in Jerusalem. He appointed Petronius as his agent. Petronius was given a large army but was instructed to try, in the first instance, to persuade the Jews to permit the installation of the statue peacefully. If the Jews refused, however, Petronius was to move with his army and install the statue by force. Petronius prepared an army of Romans and auxiliaries to carry out this mission and in due course arrived at Acre, referred to as Ptolemais. What happened there was graphically reported by Josephus:

But there came ten thousands of the Jews to Petronius at Ptolemais to offer their petitions to him that he would not compel them to violate the law of their forefathers. "But if," they said, "you are wholly resolved to bring the statue and install it, then you must first kill us, and then do what you have resolved on. For while we are alive we cannot permit such things as are forbidden by our law and by the determination of our forefathers that such prohibitions are examples of virtue. . . . They threw themselves down on their faces and stretched out their throats and said that they were ready to be slain."¹⁰

Formulation of the Duty of Civil Disobedience

The biblical instances of civil disobedience found in the case of the Egyptian midwives and that of Saul and his guards involved orders to commit murder. The cases cited from the books of *Maccabees* and from the writings of Josephus involved orders to commit the sin of idolatry. Persons of conscience may readily agree that they would prefer martyrdom rather than commit murder or practice idolatry. What about laws or decrees that call for acts not so heinous as murder or idolatry even though against the conscience?

In the course of the war that Hadrian waged to destroy Judaism and the Jewish nation, countless Jews stood ready for martyrdom. The rabbis, however, saw that indiscriminate martyrdom itself might be a peril to Jewish survival. With this consideration in mind, they decreed that the duty to prefer martyrdom was to be restricted to three transgressions: murder, idolatry, and incest.¹¹ The rabbis at-

9. F. JOSEPHUS, *ANTIQUITIES OF THE JEWS*, bk. 18, ch. 3. (Heinemann ed. 1965). See also F. JOSEPHUS, *THE JEWISH WAR*, bk. 11, ch. 10, at 184-203 (Penguin ed. 1959).

10. F. JOSEPHUS, *ANTIQUITIES OF THE JEWS*, bk. 18, ch. 8, at 271 (Heinemann ed. 1965).

11. See note 13 & accompanying text *infra*.

tributed this legal principle to *Leviticus* 18:5: "And ye shall therefore guard my statutes and my ordinances, which if a man do, he shall live in them." They concluded from this passage that the Torah, the body of Jewish law or teaching, was given to enhance life rather than to induce death. The emphasis of the Torah is on holy living, not on holy dying. The rabbis also pointed to the fact that the passage stated that the statutes and ordinances were such that by observing them a man shall live—not an Israelite, but a man.¹² With these two highly significant interpretations in mind, the rabbis felt that martyrdom had to be limited to instances involving laws that transgressed the most basic principles of what came to be called natural law.¹³ Thus, in the face of laws or orders that command idolatry, incest, or murder, the above-stated halakhic (legal) principle calls for the *duty* of civil disobedience, even at the cost of one's life.¹⁴

What of the incident involving Daniel? According to the story, Daniel was not required to perform any act. If he had not prayed at all for thirty days, he would have complied with the King's decree. Why, then, did he resort to civil disobedience? Was his conduct consistent with the legal principle later formulated by the rabbis?

It seems that the incident may be interpreted consistently with the above principle. The Persians believed that their king was a

12. The *locus classicus* of the legal formulation of the principle concerning martyrdom is in the Talmud, the great collection of Jewish law and tradition, produced in Palestine in the fifth century A.D. or in Babylonia in the sixth century A.D.

"[I]n every other law of the Torah if a man is commanded: 'Transgress and suffer not death,' he may transgress the commandment and suffer not death — excepting idolatry, incest [which includes adultery] and murder. . . . Murder may not be practiced to save one's life. . . . Even as one who came to Raba and said to him: 'The governor of my town has ordered me, 'Go and kill so and so; if not, I will slay thee.' Raba said to him: 'Let him rather slay you than that you should commit murder; who knows that your blood is redder? Maybe his blood is redder.'" THE BABYLONIAN TALMUD, *Sanhedrin* 74a (The Sancino Press ed., H. Freedman trans. 1935).

13. There can hardly be any question about murder and incest falling into this category. Idolatry was so closely associated with grossly immoral practices that it could rank with the transgressions of the basic precepts of natural law, and that association was made and stressed by the prophets of the Bible and the rabbis of the Talmud. Compare the Oedipus Cycle in Greek drama for a similar feeling of revulsion against an incestuous act.

14. In post-Talmudic Judaism, not all authorities agreed that the law imposed an absolute duty to choose martyrdom instead of murder in view of the great amount of duress involved. They also stressed the question of whether the cardinal sin was required to be committed publicly or secretly. The post-Talmudic discussions are not considered in this Article. See S. BELKIN, IN HIS IMAGE 210, 211 (1960). See generally D. DAUBE, COLLABORATION WITH TYRANNY IN RABBINIC LAW.

god. Accordingly, they set a trap for Daniel, because they suspected that he would refuse to pray to the king as one prays to God. Had Daniel failed to offer prayers to anyone for thirty days, his enemies could have used that fact as evidence of his rejection of the king as a divinity. From this point of view, the story in its essentials is not significantly different from the story in the writings of Josephus of Caligula's desire to have his statue installed in the Temple. By praying to God while looking out of the window that faced toward Jerusalem, Daniel acted out his rejection of Persian idolatry. The story of Daniel is, therefore, not only an instance of civil disobedience but is also an instance of the later legal formulation of the duty of civil disobedience to avoid the commission of idolatry, incest, or murder.

The relation in classical Jewish thought between law and conscience, as manifested by acts of civil disobedience, is extremely subtle and complex.¹⁵ For the purposes of the present discussion the exploration of this matter shall be limited to three aspects.

First, conscience, as a specific concept, does not appear in the Hebrew Scriptures. It is, however, clearly implied. The story of Cain and Abel would have no point unless conscience were assumed; there had been no supernatural revelation of a law against murder before one brother killed the other, nor was there at that time an enacted criminal code. The same may be said of the judgment on Sodom and the other cities of the plain, of Noah and the judgment on his generation, and of the judgments on Egypt and the people of Canaan.

Much of the Bible, including many passages of the prophets, assumes that there are laws written on the tablets of the heart, that there is a law in the heart.¹⁶ The words of Jeremiah, "I will put my law in their inward parts, and write it in their hearts,"¹⁷ were not only a promise but also a statement of basic belief as to the nature of man. Without this belief in a law written by God on the tablets of the heart of every man, God could not be the judge of all the universe and all peoples and nations. Without this belief, God would be only the tribal God of Israel, and He could not have been their judge be-

15. Konvitz, *Law and Morals in the Hebrew Scriptures, Plato, and Aristotle*, 23 CONSERVATIVE JUDAISM 44 (Winter 1969).

16. See, e.g., *Proverbs* 7:3, *Deuteronomy* 30:14.

17. *Jeremiah* 31:33.

fore the revelation of the Ten Commandments at Sinai. Without this belief, the commandments not to kill, not to commit adultery, or not to commit theft would have binding force only upon Israel. Indeed, the argument can be made that the conception of man was of a being with a moral conscience and with the freedom to act against it. It is this conscience of which the Bible speaks when it states that the Egyptian midwives "feared God," and that Amalek, when he acted cruelly, showed that "he feared not God."¹⁸ Similarly, Abraham pretended to be the brother of Sarah because when they came to Gerar he thought, "Surely the fear of God is not in this place; and they will slay me for my wife's sake."¹⁹

With such interpretations in mind, and with the story of Noah and the flood before them, the rabbis of the Talmud formulated what they called "the seven commandments given to the descendents of Noah." These commandments prohibited idolatry, murder, theft, incest, blasphemy, and the eating of flesh taken from living animals, and required the establishment of courts of justice. The commandments were given on the tablets of the heart and to every man everywhere, because Noah was a kind of second Adam. They spelled out, therefore, a natural law which was binding on the conscience of every man and from which no man, nation, or generation could claim exemption.

Second, this principle of a natural law which was the basis of the seven commandments given to the descendants of Noah,²⁰ was obviously the source from which Jewish tradition selected the three-part principle of civil disobedience: a person must choose to die, if neces-

18. *Deuteronomy* 25:18.

19. *Genesis* 20:11.

In Biblical contemplation, there may be said to be a special category of sin which is an act committed "against the Lord," that is, a sin which implies the denial of the existence of God. This concept of sin applies to a wrong done to another person secretly under circumstances where there are no witnesses except God. In *Leviticus* this type of sin is referred to as follows: "If any one sin, and commit a trespass against the Lord, and deal falsely with his neighbor in a matter of deposit, or of pledge, or of robbery, or have oppressed his neighbor; or have found that which was lost, and deal falsely therein, and swear to a lie, in any of all these that a man doeth, sinning therein . . ." *Leviticus* 6:2-3. Rabbi Akiba attached great significance to the phrase "against the Lord," for he believed it meant that the guilty man denies that God was a witness to the act, and thus by implication he denies God's existence or presence. This interpretation seems to give the phrase in *Leviticus* the same meaning as the phrase, "feared God," and implies conscience.

20. THE BABYLONIAN TALMUD, *Sanhedrin* 56a (The Sancino Press ed., H. Freedman trans 1935). See generally *Romans* 2:14-15; *Acts* 15:20, 29.

sary, rather than obey a law or decree by committing murder, incest, or idolatry. One significant aspect of this principle, however, is that the duty of civil disobedience is not extended to all of the seven commandments but only to these three. Thus, if a person is ordered to commit a theft on the pain of death, that person should commit the theft.²¹

Suppose that the sanction for a refusal to commit theft, however, is imprisonment, not death. May a person in that case resort to civil disobedience rather than commit the wrong? The principle is silent as to such cases. The principle only states *explicitly* that one *must* choose to suffer death rather than commit wrong when the wrong to be committed is idolatry, incest, or murder. The principle only implies that, except for idolatry, incest, or murder, when the penalty to be suffered is *death*, one *must* commit the wrong ordered and avoid death. A great deal, therefore, is left open when the wrongs commanded are other than the three cardinal ones or when the penalty threatened for disobedience is something other than death.

Finally, the distinctly Jewish halakhic approach to the problem of conscience versus law, which is an expression of the genius of classical normative Judaism, should be noted. The legal order provides a higher law by which a man is commanded to disobey certain orders, even when they are made by the king or other high officers of the state. Halakhic Judaism thus speaks not of a right but of a duty, a legal duty, of civil disobedience. While halakhic Judaism recognizes conscience, "the fear of God," or the laws written on the tablets of the heart, it converts morality into law by commanding that, given proper circumstances, the higher law becomes the living law, a living law that contradicts and even nullifies the enacted law.

The dialectic of the conceptual relationship between the demands of conscience, the inner or natural law, and the demands of enacted law or orders of the state is probably impossible to express with any precision. The ancient Jewish authorities were wise not to make the attempt; they instead resorted to existential terms. Thus, as is often the case in Hebraic-rabbinic thought, an example symbolized a principle, and the commentary became the text, as if there were a fear of making the word into a thing or of accepting the notion that in the beginning was the *logos*, the word.

21. MAIMONIDES, HILCHOT YISODEI HA-TORAH 5:4; cf. S. BELKIN, IN HIS IMAGE, 102-32 (1960).

The ultimate sanctity is life and not what is said about it in some abstract formula. Yet life, sacred as it is, is given and sustained for certain ends. If these ends are threatened, life becomes worthless and must be given up. The ends are such only because they enhance life. It is holy living and not holy dying that is cherished. God does not demand great sacrifice when the occasion is not one of transcendent importance; God makes His demands only when man is called upon to commit murder, immorality, or idolatry. Only then does the law of God demand violation of the law of man at the cost of one's life. Civil disobedience is not offered as an everyday method for meeting unwelcome situations. Society and individuals must find the answer to these by other methods and agencies.

Beyond this principle, however, Jewish tradition, as has been seen, places the highest value on martyrdom when it is the price to be paid for defiance of a tyrant whose policy is to destroy the Jewish religion. In the solemn service of Yom Kippur, a prominent place is given to a recital of the martyrdom of ten great scholars who, during the Hadrianic persecutions, steadfastly refused to accept the ban on the study of the Torah and suffered death in order to sanctify the Name of their God. Within the Jewish tradition of nonviolent civil disobedience, these ten martyrs have played a role that is at least comparable to that of Socrates for Western society: the role of witnesses to the force of the moral and religious conscience and its imperious claims to obedience.

Jewish law adapted moral claims and converted them into legal duties, so that civil disobedience itself became lawful. The resolution of the difficult conceptual problems became possible perhaps through emphasis on the concept of duty. It was not a question of what a person may or may not subjectively wish to do. It was not a question of a clash between the commands of the state and the rights of the person. It was not a question of the right of civil disobedience. It was always a matter of facing and performing one's duty: the duty not to kill, the duty not to commit an immoral act, the duty to avoid any form of idolatry. It was not a question of what one's conscience dictated but what the higher law, the law that is superior to the law of the state, demanded. An act could, therefore, appear to be an act of civil disobedience while in reality it was an act of obedience: disobedience of a lower law, which was in fact no law at all when tested against the higher law.

The halakhic view of conscience leaves nothing outside the law. It does not open the door to the claims of the individual's subjective conscience. On the other hand, this view incorporates into the law the weightiest claims of the conscience, which becomes implicated when demands are made to commit murder, grossly immoral acts, or acts that the religious conscience would consider idolatrous. Resolution of the possibility of confrontation between law and conscience could be effectuated only in a social order in which, theoretically, there was no distinction between law and religion, between religion and conscience, or between conscience and law. In such an order, the law could be the source for answers to all questions.

This all-inclusive legal order comprehended within itself certain laws that could be peculiarly denominated laws of conscience or natural laws, the laws that God had revealed to the sons of Noah and that were applicable to all people. These laws were not outside the legal order. They confronted the human being, but they did not confront, as outside challengers, the legal order.

Although Biblical Hebrew had no word for conscience,²² this fact does not mean that what we call conscience played no role in the Hebrew Scriptures or in post-biblical Jewish thought. Jewish thought assumed that the heart could tell a person that he is guilty or innocent, and as Professor Werblowsky has noted:

The Talmudic language of the rabbis, who were quite familiar with pangs of conscience and scruples, still speaks only of the "beating" or "palpitating" heart, and even Bahya ibn Pakuda (Spain, eleventh century), one of the most outstanding representatives of the ascetic spirituality that blossomed under the influence of Neoplatonism and Sufism, calls his beautiful and widely read work "The Book of the Duties of the Heart."²³

If one is going to speak of the "duties of the heart," it must become obvious that every person has a heart. Whether or not a person has stood at the foot of Sinai, he is bound by the duties imposed on the "sons of Noah." There is a preexistent law that provides a content for the heart. Each man has a heart, but each man is not a law unto himself. The heart or conscience is not a voice that speaks out of man; it is a hearing agency given to man so that he may hear the voice of God.

22. Werblowsky, *The Concept of Conscience in Jewish Perspective*, in CONSCIENCE 81 (Curatorium of C.G. Jung Institute, Zurich ed. 1970).

23. *Id.* at 90.

Today, when extreme forms of individualism often play a dominant role in religious or moral thought, conscience is often thought to have a legislative function. It makes the law for the individual which cannot be violated if one is to be true to oneself. Being true to oneself seems to be the fundamental precept of the moral order.

This legislative function is indeed remote from the traditional Jewish position. The heart or conscience has a reporting but not an originating function. It does not make law but only tells a man whether or not he has violated the law which transcends his person and which makes demands on him. The law calls to the person; the call is heard in and by the heart, but it is not the voice of man that is heard but the voice of God or of the Law. Man is true to himself only by being true to the Law.

Legislative Conscience: Saint Paul, the Greeks, and the Romans

In the Hellenistic writings, the Greek term *syneidesis* or the Latin *conscientia* was used for what is today characterized as conscience. One or the other term was used by many philosophers including Philo, Plutarch, and Seneca.²⁴ "It is very clear," it has been noted,

that *conscience* only came into its own in the Greek world after the collapse of the city-state. The close integration of politics with ethics, with the former predominant, was no longer possible: there was no sufficiently close authority, external to the individual, effectively to direct conduct. Consequently, as a *pis aller*, men fell back on the internal chastisement of *conscience* as the only authority.²⁵

For the Jew, however, the Torah remained the only authority. Even if he substituted "conscience" or "heart," he still meant that the content of his morality was the God-given law.

Against this background it becomes easier than would otherwise be the case to understand Paul's use of "conscience" in his letter to the church that he had founded in Corinth and whose members, to-

24. C. PIERCE, CONSCIENCE IN THE NEW TESTAMENT 41, 46, 47 (1955) [hereinafter cited as PIERCE]. See also Rudin, *A Catholic View of Conscience*, in CONSCIENCE 142, 146 (Curatorium of C. G. Jung Institute, Zurich ed. 1970) [hereinafter cited as Rudin].

25. PIERCE, *supra* note 24, at 76.

gether with their founder and guide, had been Jews. There was strife among them. How should they resolve their differences? To what authority could they look for answers to the questions that perplexed them? For example, they had among them a member who was living with his stepmother. Was such conduct lawful for a member of the Christian church, and if not, how should his fellow Christians treat him?²⁶ The Jewish law explicitly prohibited a man from living with his father's wife.²⁷ "Let him who has done this be removed from among you,"²⁸ Paul wrote. "Drive out the wicked person from among you."²⁹ Paul followed this halakhic decision, which he handed down with the authority of a rabbi, with a general instruction to "[s]hun immorality."³⁰

Paul's moral instruction to the Corinthians was not essentially different from the rabbinic teaching in the Seven Laws given to the sons of Noah, which was a body of universal natural law. In essence, what Paul said to his congregation was that all things had not become lawful for them, that Christians, Jews, and pagans were bound by the laws revealed to the sons of Noah, who had become, after the Flood, the progenitors of the human race. Ultimate serious questions of morality were not left to be answered by each man according to his own conscience, his own heart, or his own subjective will. Liberty, said Paul, was not license, because license means enslavement to one's wilfulness, to the lusts of the body. Thus Paul, when he withdrew from Judaism, took with him into the Christian church the rabbinic conception of a natural law, a natural morality, and the conception of a Higher Law, which imposed restraints and limits on governments and men.

Nevertheless, it was not only from the teachings of Judaism that Paul could have derived the concept of conscience. The idea had entered the Hellenistic world after the collapse of the city-state, which happened centuries before the rise of Christianity. By the time of Paul the idea had become commonplace.³¹ To cite only two examples: 1. Plutarch, who was Paul's contemporary, said that conscience was "like an ulcer in the flesh. It implants in the soul a re-

26. 1 *Corinthians* 5.

27. *Leviticus* 18:8.

28. 1 *Corinthians* 5:2.

29. 1 *Corinthians* 5:13.

30. 1 *Corinthians* 6:9-12, 18.

31. PIERCE, *supra* note 24, at 16, 57, 59.

morse which never ceases to wound and goad it. Any other pain can be reasoned away, but this remorse is inflicted by reason, on the soul which is so racked with shame, and self-chastised;"³² 2. Seneca, another of Paul's contemporaries, wrote that it is foolish to pray for a sound understanding:

There is no need to raise our hands to heaven; there is no need to implore the temple warden to allow us close to the ear of some graven image, as though this increased the chances of our being heard. God is near you, is with you, is inside you. Yes, Lucilius, there resides within us a divine spirit, which guards us and watches us in the evil and the good we do In each and every good man "[a] god (what god we are uncertain) dwells."³³

In Paul's letter to the Roman church, he neatly fused the lines of thought from Jewish tradition and Greek ideas. Jews, he wrote, will be acceptable to God as they are judged on their merits. The test for them will be, not knowledge of the Law but the extent to which they obeyed its precepts. Gentiles, too, who do not have the Law, will be judged on their merits. For each of them has a conscience, a heart; they know the difference between good and evil. Being outside the Law does not mean that they are left without a moral guide.³⁴

Suppose, however, the conscience misleads. Suppose that the conscience or heart finds nothing wrong with a man living with his stepmother. Apparently Paul could not conceive of such a case, because he assumed that there was a body of moral precepts that was known to the hearts of both Jews and Gentiles and when one of the precepts or moral laws was violated, the heart or conscience condemned the act.

32. *Id.* at 47.

33. SENECA, *LETTERS FROM A STOIC*, letter 41, p. 86 (Penguin ed. 1969). The quotation within the passage is from VIRGIL, *AENEID*, VIII:352. See Rudin, *supra* note 24, at 142.

34. "Therefore, you have no excuse, O man, whoever you are For He will render to every man according to his works. . . . There will be tribulation and distress for every human being who does evil, the Jew first and also the Greek, but glory and honor and peace for everyone who does good, the Jew first and also the Greek . . . for God shows no partiality. . . .

When Gentiles who have not the law do by nature what the law requires, they are a law to themselves, even though they do not have the law. They show that what the law requires is written on their hearts, while their conscience also bears witness" *Romans* 2:1-15.

What evil acts or habits did Paul condemn? After a special condemnation of men and women who engaged in "unnatural" sexual relations,³⁵ Paul condemned those who do things for which they deserve to die:

They were filled with all manner of wickedness, evil, covetousness, malice. Full of envy, murder, strife, deceit, malignity, they are gossips. Slanderers, haters of God, insolent, haughty, boastful, inventors of evil, disobedient to parents, foolish, faithless, heartless, ruthless.³⁶

No one, Jew or pagan, could be heard to say that his heart approved such acts or that his conscience did not condemn such acts as evil. There was an order of binding values which no one was free to violate on the claim that he heard a different drumbeat, because he must lie or be in grave error if, pursuing evil, he claimed that his conscience was clear.³⁷

Scholars seem to agree that the pagan use of *syneidesis* or *conscientia* was consistently negative or judicial; that is, the conscience passed judgment on an act that had already been committed. An evil deed evoked a bad or guilty conscience.³⁸ There is a difference of opinion, however, whether Paul's usage of the term was entirely consistent with the pagan usage.³⁹

According to Father D'Arcy, Paul should be given credit for certain innovations with respect to conscience. The term occurs twenty-three times in Paul's epistles, and in fifteen of these it has the meaning that the term had for pagan writers, retrospective in its direction and judicial in its function. In eight instances, however, two new features may be found; namely, that the conscience may be subject to error, and that the conscience purports to legislate, to direct prospective action.⁴⁰

Father D'Arcy, however, may have made an excessive claim for Paul. Pagan philosophers also often spoke as if they believed that the conscience can order a man not to undertake a course of action.

35. *Romans* 1:18-21, 29-31.

36. *Romans* 1:29-31.

37. PIERCE, *supra* note 24, at 88, points out the sources of error in conscience noted by Paul.

38. E. D'ARCY, CONSCIENCE AND ITS RIGHT TO FREEDOM 508 (1961) [hereinafter cited as D'ARCY].

39. PIERCE, *supra* note 24, at 114.

40. D'ARCY, *supra* note 38, at 8-12.

Plato's *Apology* readily comes to mind in this connection. If he were to be acquitted, Socrates said, on condition that in the future he would lead a different kind of life than the kind which had gotten him into his desperate situation, his response would be as follows:

Men of Athens, I respect and love you, but I shall obey the god rather than you, and while I live and am able to continue, I shall never give up philosophy or stop exhorting you and pointing out the truth to any one of you whom I may meet. . . . For know that the god commands me to do this Therefore I say to you, men of Athens, either do as Anytus tells you, or not, and either acquit me, or not, knowing that I shall not change my conduct even if I am to die many times over.⁴¹

Socrates related the incident when the Thirty tried to involve him in a criminal action that would have led to the execution of Leon of Salamis:

Then I, however, showed again, by action, not in word only, that I did not care a whit for death if that be not too rude an expression, but that I did care with all my might not to do anything unjust or unholy. For that government [of the Thirty], with all its power, did not frighten me into doing anything unjust⁴²

Conscience, in these instances, worked prospectively and legislatively to prevent Socrates from entering upon an evil course of conduct. Clearly, in these cases, conscience did not act to condemn, to pass judgment upon an evil act already done or commenced.⁴³

Whether Socrates or Plato or the Stoics used a word, Greek or Latin, meaning conscience is not important in the history of the idea.

41. PLATO, *THE APOLOGY* 290-300 (H.N. Fowler trans. 1914).

42. *Id.* at 32D.

43. Of note is the fact that Socrates spoke of the voice within him as having a negative effect by commanding him not to do a certain act: "Something divine and spiritual comes to me, the very thing which Meletus ridiculed in his indictment. I have had this from my childhood; it is a sort of voice that comes to me, and when it comes it always holds me back from what I am thinking of doing, but never urges me forward." *Id.* at 31C-D. Indeed, Socrates referred to this voice within him as having a future thrust, rather than something that condemned only past actions: "For hitherto the customary prophetic monitor always spoke to me very frequently and opposed me even in very small matters, if I was going to do anything I should not . . . but the divine sign did not oppose me either when I left my home in the morning, or when I came here to the court, or at any point of my speech, when I was going to say anything; and yet on other occasions it stopped me at many points in the midst of a speech" *Id.* at 40B-C. See also *EPICETUS, ARRIAN'S DISCOURSES*, I, ch. 1, 21-25; IV, ch. 7, 17-20 (Heinemann ed. 1925) for additional examples of the prospective function of conscience.

An unprejudiced reading of the relevant texts shows that to these philosophers the conscience spoke legislatively and prospectively, and it was precisely because it performed this function that conscience was of such transcendent importance. The retrospective, judicial use of the conscience cannot compare in importance, precisely because this function of the conscience is identified with the past, with what has been done and cannot be undone. It is the difference between planning the future and brooding over the past.⁴⁴

Within classical Judaism the Law was seen as being all-embracing, covering all contingencies, and incorporating the basic and indispensable principles of natural law or morality. No room was left for the role of the individual's subjective conscience. As seen in normative Judaism, King Saul's guardsmen, the martyrs of the books of *Maccabees*, the Jews who confronted Petronius, Daniel, and even the Hebrew midwives did not need to plead conscience; they could have pointed to the Noahide or halakhic laws as the basis for their actions.⁴⁵ Whatever the question, whatever the problem, the answer could be found in the objective law.⁴⁶ This objective law does not mean that conscience was unknown to Judaism. The genius of Judaism was to translate the dictates or work of conscience into legal principles, and in theory nothing important was left beyond the pale of the law. All that was conceivably important in conscience had been assimilated into the law just as English equity law assimilated moral principles.

Christianity, however, with its strong antinomian bias, took a different course. The early church, as the Epistles of St. Paul show,

44. Paul Tillich gives a different interpretation, according to which the demanding, prospective conscience, the warning conscience, is only the anticipation of the judging or condemning conscience. He says, "The fact that self and conscience are dependent on the experience of personal guilt explains the prevalence of the 'bad conscience' in reality, literature, and theory. It gives evidence of the assertion that the uneasy, accusing, and judging conscience is the original phenomenon; that the good conscience is only the absence of the bad conscience; and that the demanding and warning conscience is only the anticipation of it. Since ego-self and conscience grow in mutual dependence and since the self discovers itself in the experience of a split between what it is and what it ought to be, the basic character of the conscience — the consciousness of guilt — is obvious." P. TILlich, *THE PROTESTANT ERA*, 136-37 (J. Adams trans. 1951). This view is based on the theory that self-consciousness arises out of a sense of guilt, which is conscience. Without this sense of guilt or conscience, there would be no awareness of the "inner man," of selfhood.

45. The anachronism in this statement of the case is, of course, recognized. The matter is presented not historically but theoretically.

46. See A. STEINSALTZ, *THE ESSENTIAL TALMUD* 95-100 (1976).

had to face the challenges that came from Jewish converts who still had ties to halakhic principles and practices and from pagan converts whose lives and actions tended to reflect Roman or other customs or systems of secular law. There was nothing on which the Christian could fall back in times of crisis except the imperative claims of the conscience.

One's conscience is fallible, of course. It may not condemn when it should, or it may misdirect. Scholastic philosophers were aware of these problems.⁴⁷ Many medieval moralists took a position against the claims of conscience by arguing, on the strength of a point made by St. Augustine, that a subordinate authority is not binding if it runs counter to the command of a superior authority, "as for instance, if the proconsul were to enjoin what the Emperor forbade."⁴⁸ The question then arises as to the correct course of action if the proconsul appears to speak in the name of the Emperor, if the subordinate authority (the conscience) claims to speak at the command of the superior authority (God)? St. Albert the Great, in the thirteenth century, took the position that conscience, or the subjective factor, must be controlling and must be recognized as having sovereign authority.⁴⁹

The position taken by Albert became the position of Thomas Aquinas and appears to be that of Catholic theologians generally. It has been summarized as follows:

If conscience, rightly or wrongly, declares an action to be commanded by God, and a man decides to do the opposite, he cannot avoid sin. The reason he [Thomas] gives is simple, and it seems to be decisive: "As far as lies within him, a man [who has heard the voice of conscience but chooses to disobey it] is determined not to obey the will of God."⁵⁰

The conscience may be in error, or the error could be removed and the judgment of conscience reversed, but as long as the judgment of conscience stands, a person is bound not to act against it.⁵¹ Any other answer would mean that a person may consciously choose to disobey what he believes to be the judgment of God. To one who identifies the voice of conscience with the voice of God, there can be no alternative; he is bound not to act against his conscience.

47. See generally D'ARCY, *supra* note 38.

48. *Id.* at 77.

49. *Id.* at 85.

50. *Id.* at 100-01.

51. *Id.* at 113.

Thomas contended that to despise the command of conscience, if one believes that conscience is the voice of God, is to despise the command of God. Modern Catholic teaching takes the argument to the positive conclusion that it is the same thing to obey the command of conscience as to obey the command of God.⁵²

Because at times the conscience may fall into error, the Church found it necessary to intervene, to assert its authority, and to make its priests advisers and guides. Thus, it began to instruct priests in casuistry, the science of dealing with cases of conscience.

It may be, as Tillich contends, that for Thomas Aquinas and the Catholic Church generally, as well as for Luther, the authority of the conscience was limited to the ethical sphere and that they did not recognize the possibility of a religious conscience. Heresy, therefore, could not be avowed with a good conscience. Heresy had to be seen as simply a demonic possession and condemned as being, perhaps literally, the work of the devil.⁵³ This view, however, may be an overrefinement that falsifies the subjective facts. Surely the early Christian martyrs, like the Maccabees before them and the Jews who offered their lives in defense of the Temple against the threats of Caligula, would not have recognized this limitation on conscience or the sharp separation of religion from morals. Furthermore, it is doubtful if traditional Catholics or even Puritan Calvinists could have made this distinction.

In any case, after Calvin there was a proliferation of religious sects and religious enthusiasts claiming conscience as the source of their religious insights. The recognition of religious pluralism and the wisdom of religious toleration as the state's policy flowed from this development. Religious conscience, therefore, came of age with the Reformation's sectarian movements.

When considering Calvin in this context, it is important to note the great difference between the tone and direction of the *Institutes of a Christian Religion*, written in their final version in 1559, and his subsequent biblical commentaries, especially the *Commentaries on the Book of the Prophet Daniel*, written in 1561.⁵⁴ As long as Calvin had

52. *Id.* at 125

53. P. TILICH, *THE PROTESTANT ERA*, 139-40 (J. Adams trans. 1951).

54. As the late George H. Sabine noted: "In its initial form Calvinism not only included a condemnation of resistance but it lacked all leaning toward liberalism, constitutionalism, or representative principles. Where it had free range it developed

power in Geneva and could hope that his form of Protestantism would become the religion of the French kings, he, like Luther, stressed the divine right of the secular power and the duty of passive obedience. It is, he wrote, "impossible to resist the magistrate without, at the same time, resisting God himself."⁵⁵ While private persons had no right to resist tyranny, Calvin conceded the possibility and propriety of inferior officers deriving from God the right of resistance. He referred to the *ephor*i, who were a check upon the kings of the Lacedaemonians, to the plebian tribunes of Rome, and to the *demarchi*, who were a check upon the Athenian senate. Such officers, Calvin wrote, betray the liberties of their people if they fail to oppose the violence or cruelty of kings: "such forbearance involves the most nefarious perfidy."⁵⁶ In the *Institutes*, however, Calvin recognized one exception to the duty of obedience to government: if the rulers command anything that is against God, "it ought not to have the least attention; nor, in this case, ought we to pay any regard to all that dignity attached to magistrates." At this point Calvin cited the case of Daniel.⁵⁷ In matters pertaining to religion, "[W]e ought to obey God rather than men [and] suffer any thing rather than deviate from piety."⁵⁸

When it became apparent to Calvin that his followers were not going to have an easy time in France, the Netherlands, and elsewhere, he concentrated on this right or duty of resistance when the temporal jurisdiction threatened the spiritual realm. In his *Commentaries on the Book of the Prophet Daniel*, written several years after the final edition of the *Institutes*, he argued that fear of God must come ahead of honor of kings. If it were the reverse, there would be a perversion

characteristically into a theocracy, a kind of oligarchy maintained by an alliance of the clergy and the gentry from which the mass of the people were excluded and which was, in general, illiberal, oppressive, and reactionary. . . . In practice, wherever possible, Calvinist government [as in Geneva and Massachusetts] placed the two swords of Christian tradition in the church, and gave the direction of secular authority to the clergy rather than to secular rulers. The result was likely to be an intolerable rule of the saints: a meticulous regulation of the most private concerns founded upon universal espionage, with only a shadowy distinction between the maintenance of public order, the control of private morals, and the preservation of pure doctrine and worship." G. SABINE, *A HISTORY OF POLITICAL THEORY* 363 (3d ed. 1961).

55. 2 J. CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION*, bk. IV, ch. 20, sec. xxiii, (J. Allen trans. 1936).

56. *Id.* at sec. xxxii.

57. *Id.* at sec. xxxiii.

58. *Acts* 5:29.

of the order of nature, because kings obtain their authority only from the fear of God.⁵⁹

One does not need Christianity, the Reformation, or the Protestant conscience to understand or interpret the case of Daniel. In its essentials it is not different from the case of the Maccabees and other cases of civil disobedience reported in the apocryphal books or by Josephus. When Peter said, "We must obey God rather than men,"⁶⁰ he spoke as a Jew to other Jews, to whom he did not need to explain what he meant by this proposition. We should remember, too, that it was Socrates who said to the Athenian jury that tried him: "Men of Athens, I respect and love you, but I shall obey the god rather than you."⁶¹ If Luke was the author of *The Acts of the Apostles*, it is possible that he was familiar with Plato's *Apology*.⁶² The author of the book *Daniel*, the authors of the apocryphal books, Josephus, Peter and the other apostles, and the authors of the New Testament all lived and participated in Hellenistic Jewry;⁶³ all were, more or less, at home in both Jewish thought and Greek culture.⁶⁴ Whether or not they knew the word for it, all were familiar with what came to be known as conscience. Calvin, therefore, broke no new ground in his *Commentaries on the Book of the Prophet Daniel*. His stand on civil disobedience had behind it a well-established Jewish-Christian-Hellenic-Hellenistic tradition that insisted on the primacy of the law of God over the pretended law of an earthly ruler and on the duty of the subject to disregard the impious order of the king.

The Protestant Reformation, however, delivered much more than was expressly promised by Calvin and the other Reformation leaders.

59. "For if anyone begins his reverence of an earthly prince by rejecting that of God, he will act preposterously, since this is a complete perversion of the order of nature. Then let God be feared in the first place, and earthly princes will obtain their authority, . . . Daniel, therefore, . . . defends himself with justice, since *he had not committed any crime against the king*; for he was compelled to obey the command of God, and he neglected what the king had ordered in opposition to it. For earthly princes lay aside all their power when they rise up against God, and are unworthy of being reckoned in the number of mankind. We ought rather utterly to defy them than to obey them whenever they are so restive and wish to spoil God of his rights, and, as it were, to seize upon his throne and draw him down from heaven." J. CALVIN, COMMENTARIES ON THE BOOK OF THE PROPHET DANIEL, I, 378, 381-84 (T. Myers trans. 1852-1853).

60. Acts 5:29.

61. PLATO, THE APOLOGY 29d (H.W. Fowler trans. 1914).

62. PEAKE'S COMMENTARY ON THE BIBLE 892 (M. Black & H. Rowley eds. 1962).

63. All were Jews except Luke, who was a Gentile, possibly converted by Paul.

64. See Tcherikover, *The Cultural Background*, 6 THE WORLD HISTORY OF THE JEWISH PEOPLE 33 (1972).

Once the Church and its priests were eliminated as mediators of the individual's conscience, causistry was discountenanced, the Bible became subject to an open-ended variety of interpretations, and a church was seen as a voluntary congregation or association of men. The individual conscience received a divine or religious sanction. Given the mixture of ingredients, no other result was possible. The roots of conscience, as has been seen, are deeply planted in the Hebrew Scriptures and Jewish history, in Christian martyrology, in the life and death of Socrates, and in Hellenistic culture. Its flowering, however, came only with the Protestant Reformation, which, almost unknowingly, took into itself this rich heritage, together with some elements from the Renaissance, and it gave forth to the world what may be acknowledged as the Protestant conscience.

Whether individualism could have developed without the idea of the individual conscience or whether the individual conscience could have developed without the idea of individualism is a matter of speculation. Nevertheless, a strong case can be made for the priority of the individual conscience and for the proposition that the roots of the idea of individualism are to be found in religious thought.⁶⁵ In any case, the ideas are intertwined and perhaps inseparable. In the modern period of history, the religious conscience seems to have asserted itself before the moral conscience gained recognition.

65. See Y. ARIELI, *INDIVIDUALISM AND NATIONALISM IN AMERICAN IDEOLOGY* 242-72 (1964).

